SUPREME COURT OF THE UNITED STATES.

No. 902.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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a THE WESTERN UNION TELEGRAPH COMpany, appellant,
vs.
THE STATE OF TEXAS, APPELLEE. } No. 4380.

Applied for by Walton, Green & Hill, attorneys for appellant, April 13, 1881, and delivered to Walton, Green & Hill the 18th day of April, A. D. 1881.

E. HALLMANN,
Clk D. C. T. C.
By HART, *Deputy.*

Filed in supreme court at Austin, April 18, 1881.
W. P. DE NORMANDIE,
Clerk.

From Travis County.

1 *Caption.*

THE STATE OF TEXAS,
County of Travis:

At a term of the district court begun and holden at Austin, within and for the county of Travis, before the Hon. A. S. Walker, and still in session, the following case came on for trial, to wit:

Amended original petition.—Filed March 7, 1881.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH CO. } No. 5490.

THE STATE OF TEXAS,
County of Travis:

In district court, Jan'y term, A. D. 1881.

The State of Texas, plaintiff in cause No. 5490, styled The State of Texas vs. the Western Union Telegraph Company, pending in said court, by leave of the court, files this, plaintiff's amended original petition, in lieu of, and as substitute for, plaintiff's original petition, filed on the 28th day of August, A. D. 1880, in said cause, and complaining of the Western Union Telegraph Company, a body chartered and incorporated under the general laws of the State of New York, defendant,
2 respectfully represents that the said defendant is a corporation duly chartered and incorporated under and by virtue of "An act to provide for the incorporation and regulation of telegraph companies," passed by the legislature of the said State of New York on the 12th day of April 1848, and the several acts amendatory thereof, and is doing, conducting, and carrying on business in the State of Texas having its line of telegraph therein, with an office and agent in the said county of Travis. That the business of said defendant is to transmit messages over its telegraph lines for hire, for which service it charges and receives pay according to a tariff of prices fixed by itself. That under the laws of the State of Texas it is the duty of the person

in charge of defendant's business in said State of Texas, or chief manager, to keep a list and record of all messages so sent and transmitted over its lines of telegraph, and to make a report of the same under oath every three months to the comptroller of public accounts of the said State of
3 Texas giving and showing in such report the number of full-rate messages, and the number of messages of less than full rate, so transmitted as aforesaid, for the preceding three months. That at the time such report was required by law, as aforesaid, to be made to the said comptroller, it was the duty of the said defendant, and under the laws of the said State of Texas the said defendant was liable and bound at the same time such report was required to be made to pay to plaintiff, at the office of the said comptroller of public accounts, in the city of Austin, in the said county of Travis, a tax of one cent for every full rate message, and one-half of that for every message less than a full rate message, sent as aforesaid, the number of such messages, and the amount of tax, to be arrived at from said report. That defendant, by its said manager, reported as required by law, the number of such messages so transmitted over its lines of telegraph in the said State
4 of Texas, during the month of September, A. D. 1879, and paid over to the proper officer of the State of Texas, the amount of tax imposed and then due, which amount so paid and acknowledged to be due and owing by defendant on messages sent during the said month of September, A. D. 1879, was the sum of two hundred and sixty-two and $\frac{86}{100}$ dollars. That since the first day of October, A. D. 1879, the said defendant, and its said manager, officers, and agents have failed and refused to make and file with the said comptroller of public accounts the reports required, and have failed and refused to pay the tax imposed upon the business of said defendant, as aforesaid, and do now still fail and refuse, although often requested, to make and file said reports, and to pay said tax, to plaintiff's great damage. That the said defendant has continually carried on its said business in the State of Texas, from the first day of October, A. D. 1879, and has sent and transmitted over its said lines of telegraph in the State of Texas,
5 since said date, and up to the first day of July, A. D. 1880, a great number of messages, both full rate and less than full rate, and have charged and received pay for the same at their regular prices; the number of such messages so sent and transmitted not being known to this plaintiff definitely, by reason of the failure of defendant, its officers, managers, and agents to report the same to the said comptroller of public accounts, as hereinbefore stated, but plaintiff avers and charges that the number of such messages so sent each month, from the first day of October, A. D. 1879, to the 31st day of December, A. D. 1879, inclusive, was about thirty thousand full-rate messages, and about twenty thousand less than full-rate messages, and was sufficient to make the tax due to plaintiff by defendant at the rate hereinbefore stated, fully the sum of four hundred dollars for each and every one of said months, making the sum of twelve hundred dollars due
6 and payable as taxes as aforesaid by defendant to plaintiff, on or before the first day of April, A. D. 1880; and that the number of such messages so sent each month from the first day of April, A. D. 1880, to the 30th day of June, A. D. 1880, inclusive, was about thirty thousand full-rate messages, and about twenty thousand less than full-rate messages, and was sufficient to make the tax due to plaintiff by defendant, at the rate hereinbefore stated, fully the sum of four hundred dollars for each and every one of said months, making the sum of twelve hundred dollars due and payable as taxes as afore-

said by defendant to plaintiff, on or before the first day of July, A. D. 1880. That in the manner and form aforesaid the said defendant became and is legally and justly indebted to plaintiff, as hereinbefore stated, in the full sum of three thousand six hundred dollars, to wit: Twelve hundred dollars due and payable on or before the first day of January, A. D. 1880; twelve hundred dollars due and payable
7 on or before the first day of April, A. D. 1880, and twelve hundred dollars due and payable on or before the first day of July, A. D. 1880, with legal interest on each of said sums of money from the time they severally became due and payable. That the said defendant, although often requested, has not paid said sums of money with interest as aforesaid, or any part thereof, but refuses so to do, to plaintiff's damage five thousand dollars.

Wherefore plaintiff brings this suit and prays an order of this court, compelling and requiring B. S. Pillow, who, plaintiff alleges is the manager of the business of defendant in the State of Texas, and who resides in the said county of Travis, or some other agent of defendant, claimed by them and recognized by the court to be the chief manager of the business of defendant in the State of Texas, to bring with him and produce and file for the inspection of the court a record, statement, and re-
8 port of the number of messages sent and transmitted over the lines of defendant, in the State of Texas, from the first day of October, A. D. 1879, to the 30th day of June, A. D. 1880, inclusive, giving in said statement and report the number of full-rate messages and less than full-rate messages; and that said Pillow or such other agent, be then and there required to make oath to the truth of the statements contained in such report, to the end that the amount of tax due, and owing this plaintiff by defendant, may be more definitely arrived at.

And plaintiff further prays that the said defendant be cited to answer this petition, and that plaintiff have judgment against said defendant for the said sum of three thousand six hundred dollars, or for the full amount of taxes found to be due and owing her, with interest as aforesaid, and costs of this suit, and for such other and further general and special relief, both at law and in equity, as she is entitled, &c., &c.

J. H. McLEARY,
Att'y-General.
9 E. T. MOORE,
County Att'y.
D. W. DOOM,
Att'y for Plaintiff.

(Endorsed:) No. 5490. The State of Texas The Western Union Telegraph Company. Amended original petition. Filed March 7, 1881. E. Hallman, clerk, by Hart, d'py.

Defendant's original answer.—Filed Jan'y 5, 1881.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 5490.

And now in the above styled and numbered cause comes the defendant by its attorneys, and demurs to plaintiff's original petition in this cause, and says the same is insufficient in form and substance, and that the matters and things therein set out constitute no cause of action, and

require no answer of this defendant; whereof defendant prays judgment of the court.

WALTON, GREEN & HILL,
Att'ys for Def't.

And if defendant's foregoing demurrer be overruled, and defendant held to answer, it says, by way of answer.

10 1st. Defendant denies all and singular the matters and things in plaintiff's original petition set forth, and demands strict proof.

2d. Defendant, further answering, says that plaintiff ought not to have or maintain this cause and demand, or any part thereof, against defendant, because the said act of the legislature of the State of Texas, and pretended law, whereby the taxes in plaintiff's petition mentioned and sought to be imposed, and on which this suit is based, is in conflict with and in violation of the Constitution and laws of the United States, and null and void; and

3d. And, more specially answering, defendant says that said act and pretended law of the State of Texas is null and void, for the reasons aforesaid, in that the same is an attempted interference with commerce between the State of Texas and the other States and portions of the United States, in so far as the same is, or is attempted to be, made applicable to telegraphic messages transmitted by defendant

11 over its lines, because defendant says that its lines for said business extend beyond the limits of the State of Texas, and into all the other States, and into the Territories of the United States, and into the District of Columbia, and to the seat of government of the United States, and constitutes a necessary and convenient medium of communication and agency for the commercial intercourse between points within said State of Texas and said other States, Districts, and Territories; and

4th. Defendant says that the messages transmitted over its lines, and for which and on account of which the said tax is in this suit sought to be recovered, were and are messages transmitted from points without the State of Texas, but within the United States, to points within said State of Texas, and from points within said State of Texas to such points beyond said State; and

5th. Defendant says that a large portion, to wit, one-half of said messages on which said tax is herein sought to be recovered are

12 and were messages transmitted from the different departments, offices, and agencies of the Government of the United States to persons, other offices, departments, and agencies, concerning and auxiliary to the public business, service, and governmental offices of the United States; and

6th. That a large portion, to wit, one-half of said last-named telegraphic messages, were not originally received for transmission from the senders thereof by this defendant, but that the Government of the United States owns and operates within the State of Texas a line of telegraphic wires and apparatus situated and extending along the Indian and Mexican frontiers of said State, and from the offices and agencies of which lines said messages were passed to and transmitted over the lines of this defendant, and which messages related to the necessary military and other service of said United States; and

7th. Defendant further says, that heretofore, to wit, on the

13 12th day of June, 1867, defendant, in pursuance of an act of the Congress of the United States entitled "An act to aid in the

construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," and which act was approved July 24, 1866, filed in the office of the Postmaster-General of the United States the full and proper acceptance of this defendant, executed in legal form, whereby this defendant accepted the provisions of said act of Congress, with all the powers, privileges, restrictions, and obligations conferred and required thereby, whereby defendant became, and still is, entitled to all the privileges and immunities conferred by reason of said act and the several acts amendatory thereof and supplemental thereto, and the premises, and whereby the said Government of the United States became and is authorized to use and deal with defendant's lines and apparatus according to the tenor of said act, and whereby said government became entitled, through its officers, to stipulate and fix the rate of compensation for the
14 transmission of the aforesaid messages between the said defendant's officers, persons, and agencies of said government as in said act set forth and provided, and as set forth in Title LXV of the Revised Statutes of the United States; and

8th. That said pretended law, whereby said tax is sought to be imposed and here recovered, is in conflict with, and in derrogation of said act of Congress and the rights of defendant thereunder.

9th. And, further answering, defendant says that said pretended law, under and by virtue of which said taxes sought to be imposed and here enforced, is null and void, because contrary to and in violation of the constitution of the State of Texas, in this, that the same is not uniform with other taxes and modes of taxes created, established, and enforced by the laws of said State, and because the taxes sought thereby to be enforced against this defendant are unequal as compared with taxes imposed against others, and because the same is oppres-
15 sive, unjust, and ought not to be enforced; wherefore defendant prays to be discharged hence with costs, &c., &c.

WALTON, GREEN & HILL,
Att'ys for Def't.

(Endorsed:) #5490. The State of Texas vs. The Western Union Telegraph Company. Defendant's original answer. Filed January 5, 1881. E. Hallman, clerk.

Plaintiff's first supplemental petition.—Filed March 7, 1881.

In the district court of Travis Co., Texas, Jan. term, A. D., 1881.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } #5490.

And now in the above entitled cause comes the State of Texas, plaintiff, by attorneys, and by leave of the court files this plaintiff's first supplemental petition in reply to defendant's original answer in said cause, filed on the 5th day of January, A. D., 1881, and replying to said original , plaintiff demurs to the 2d, 3d, 4th, 5th, 6th, 7th, 8th and 9th divisions of the said original answer, and says that they all are and each of them is insufficient in law, and of this plaintiff prays the judg-
16 ment of the court.

And further replying to said original answer, plaintiff denies

each and every allegation contained therein, and of this puts herself upon the country and prays judgment.

J. H. McLEARY,
Att'y Gen'l.
E. T. MOORE,
County Att'y.
D. W. DOOM,
Att'y for Plaintiff.

(Endorsed:) No. 5490. The State of Texas vs. The Western Union Telegraph Company. Plaintiff's first supplemental petition. Filed March 7, 1881. E. Hallman, cl'k, by Hart, d'p'y.

Judgment—March 10, 1881.

THE STATE OF TEXAS
vs. } #5490.
THE WESTERN UNION TELEGRAPH COMPANY.

On this, the 10th day of March, A. D., 1881, came the parties by their attorneys, and then came on to be heard the application of plaintiff to require the defendant, its agent or attorney, to produce and file a report under oath, showing the number of full-rate messages and
17 *and* the number of messages of less than full rate, transmitted over defendant's telegraph lines in the State of Texas during the months of October, November, and December, A. D., 1879, and January, February, March, April, May, and June, A. D., 1880, and the same being considered, and it being admitted by the defendant that it is a corporation chartered and doing the business of telegraphing during the said months, in said State, as alleged by plaintiff, and that it is within its power to make such report, it is ordered by the court that the defendant, by its agent or attorney, make, produce, and file the report asked for by the plaintiff for the inspection of the court, or show cause why it shall not do so; to which ruling of the court the defendant, by its counsel, excepted. And thereupon, in obedience to said order, filed the report required, supported by the affidavit of Lava C. Baker, the superintendent of defendant's business in Texas. And thereupon the defendant presented and urged the demurrer and exceptions by it filed;
18 and after argument the said demurrer and exceptions were by the court overruled; to which ruling of the court defendant excepted. And both parties being present in court, by their attorneys, announced themselves ready for trial, and waive a jury and submit the matters in controversy, as well of fact as of law to the court, and the pleadings, evidence, and argument of counsel having been heard and fully understood, it is considered, ordered, adjudged, and decreed by the court that the plaintiff, the State of Texas, do have and recover of and from the defendant, The Western Union Telegraph Company, the sum of two thousand three hundred and five and $\frac{91}{100}$ dollars, with interest thereon from this date until paid, at the rate of eight per cent. per annum, together with all costs in this behalf expended, and that plaintiff have her execution; whereupon defendant, by its counsel, excepts to the conclusions of law found by the court and this judg-
19 ment rendered on the conclusions of fact found by the court, and in open court gives notice of appeal to the supreme court of the State of Texas.

Statement of conclusions of law and of fact found by the judge in trying the case. Filed March 10, 1881.

In the dist. court of Travis Co., Texas.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } No. 5490.

On the trial of the above-styled cause the following conclusions as to facts were found from the testimony and admissions of the parties:

1st. That the defendant was an incorporated and chartered telegraph company, doing business in the State of Texas from the first day of October, A. D. 1879, continuing to the 1st day of July, A. D. 1880, during said time sending telegraphic dispatches as a business; that its lines extend along the railroads of Texas and into and through nearly all the States of the Union and to Washington City, D. C.

2. That during the months of October, November, and December, 1879, said company sent 69,593 full-rate messages and 45,646
20 half messages in the State, and during the months of January, February, March, April, May, and June, A. D. 1881, it sent 99,483 full-rate messages and 55,762 half-rate messages.

3. That said company has an office and resident agent or employé residing and on duty in his employ for the defendant in Travis County, Texas.

4. That the defendant is chargeable for $2,197.80 taxes under section 4665 Revised Statutes (p. 676), as occupation-taxes for and during the said time from October, 1879, until July 1, A. D. 1880, and that of said sum $924.16, under the laws regulating interest in Texas, bore 8 % from January 1, 1880 (being one year, two months, and ten days), $88.30, and that $1,273.64 thereof bore interest at same rate from January 1, 1881 (two months and ten days), $19.81, making an amount $2,305.91, due on day of trial.

5. It also appeared from the testimony that the number of messages above stated included all messages sent from Western Union
21 Telegraph offices within the State of Texas to all other points in the United States, both within and out of the State of Texas; also messages sent from the government officers and agents of the United States in Texas to other officers, agents, or departments of the said United States Government; also all the messages sent over Western Union lines from points in Texas relative to commerce between Texas and other States of the Union during the time stated. A large proportion of messages sent belonged to the classes here enumerated.

6. The defendant company has about 125 offices in Texas. The number of messages sent without the State was not shown, nor the amount sent by the United States Government, its agents, or employés, nor those relating to commerce during the time.

7. It was shown that Gen. B. C. Ludlow, col. int. rev. 3d dist., used the company as means of communication with the government and with other officers—used it every week—at special rates, lower
22, 23 than those charged against others sending messages, the special rates fixed by the P. O. Department being one cent per word for each five hundred miles.

8. It was shown that on June 12, 1867, the defendant company, in pursuance of an act of Congress of the United States, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," ap-

proved July 24, 1866, filed in the office of the Postmaster General of the United States the full and proper acceptance of the defendant company of the terms of said act.

9. That the U. S. Gov. has in Texas a line of telegraph called the military telegraph, owned by the government, and that the lines of the defendant connect with and are used in the transmission of messages by the Government of the United States and its officers in connection with the military telegraph line.

10. The court holds the State law efficient, imposing an occu-
24 pation-tax graded by the number of times the apparatus of the company are used in the transmission of messages in its business.

Judgment for plaintiff. March 10, 1881.

A. S. WALKER,
Judge 16th District, &c.

(Endorsed:) No. 5490. The State of Texas vs. The Western Union Telegraph Company. Statement of conclusions of law and of fact found by the judge in trying the case. Filed March 10, 1881. E. Hallman, clerk, by Jas. P. Hart, d'p'y.

Assignment of error.—Filed March 30, 1881.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } No. 5490.

And now in this cause comes the defendant and makes assignment of the following errors in the district court as grounds for reversal of the judgment therein:

1. The court erred in overruling defendant's demurrer to plaintiff's petition.

25 2. The court erred in entering its order requiring defendant to make exhibit and discovery of the number of messages sent over its lines.

3. The court erred in not rendering judgment for defendant, for the reasons and on the several grounds set forth in its original answer, said grounds being set forth in said answer in subdivisions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, &c.

4. The court erred in rendering judgment for plaintiff.

5. The court erred in rendering judgment for plaintiff upon the facts found.

6. The judgment is not supported by the facts found.

7. The court erred in rendering judgment against defendant for interest.

WALTON, GREEN & HILL,
Atty's for Def't, Appellee.

(Endorsed:) 5490. The State of Texas vs. The Western Union Telegraph Company. Assignment of errors. Filed March 30, 1881. E. Hallmann, clerk, by Hart, d'p'y.

26 *Appeal bond.—Filed March* 30, 1881.

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 5490.

Whereas, on the 10th day of March, 1881, The State of Texas recovered a judgment in the district court of Travis County, Texas,

against the Western Union Telegraph Company for the sum of two thousand three hundred and five dollars and ninety-one cents, and all costs of suit, from which judgment the said Western Union Telegraph Company appealed to our supreme court:

Now, therefore, we, The Western Union Telegraph Company, as principal, and P. C. Taylor and Ben. S. Pillow, as sureties, acknowledge ourselves bound to pay to the State of Texas the sum of four thousand seven hundred dollars. Conditioned that the said The Western Union Telegraph Company shall prosecute its appeal with effect, and in case the judgment of the appellate court shall be against it, that
27 it shall perform the judgment, sentence, or decree of said court, and pay all such damages as said court may award against it.

Witness our hands this 26th day of March, 1881.

THE WESTERN UNION TELEGRAPH COMPANY,
Per WALTON, GREEN & HILL, *Att'ys.*
P. C. TAYLOR
BEN. S. PILLOW.

Approved March 30, 1881.

E. HALLMANN,
Cl'k D. C. T. C.,
By JAS. P. HART, *D'p'y*

(Endorsed:) 5490. The State of Texas vs. The W. U. Tel. Co. Appeal bond. Filed March 30, 1881. E. Hallmann, cl'k, by Jas. P. Hart, d'p'y.

28 *Bill of costs.*

THE STATE OF TEXAS
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } No. 5490.

Dock	20
Issuing citation and duplicate	1 50
Entering appearances	30
3 orders and decree	2 25
Taking affidavit	50
Issuing 1 subpœna	25
" 1 ad., names	15
Swearing witnesses	20
Iss. 2 com	1 50
Taking bonds	1 50
Filing 15 papers	2 25
Entering judgment	75
Assessing damages	50
Issuing 2 certificates	1 50
Transcript	11 40
Total clerk's cost	$24 75

SHERIFF AND MISCELLANEOUS.

Serving 1 cit. and mil	1 60
" 1 witness	1 20
Venire fee	50
B. C. Ludlow, wit. fee	1 00
Total cost	$29 05

29 THE STATE OF TEXAS,
County of Travis:

I, E. Hallmann, clerk of the district court within and for the county and State aforesaid, do hereby certify that the foregoing, on 20 pages, contain a true and correct transcript of the original papers, and all proceedings had in case No. 5490, of The State of Texas vs. The Western Union Telegraph Company, as the same appears of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court this the 13th day of April, A. D. 1881.

[SEAL.] E. HALLMANN,
Clerk D. C. T. C., Texas,
By JAMES P. HART,
Deputy.

30 CLERK'S OFFICE, SUPREME COURT,
Austin, July 8, 1881.

I, W. P. de Normandie, clerk of the supreme court of Texas, at Austin, hereby certify that the preceding thirty pages contain a true and correct copy of the transcript of the record in the cause of the Western Union Telegraph Company, No. 4380, appealed from the judgment of the district court of Travis County, and now on file in said office.

Witness my hand and the seal of said court, at Austin, the day and year above written.

[SEAL.] W. P. DE NORMANDIE,
Clerk Supreme Court.

30½ THE WESTERN UNION TELEGRAPH COMPANY, appellant,
vs.
THE STATE OF TEXAS, APPELLEE. } No. 4380.

Proceedings in the supreme court.

April term, 1881.

31 THE STATE OF TEXAS:

Be it remembered that at a term of the supreme court of Texas, begun and holden at the city of Austin, on Monday, April 4th, A. D., 1881, the time fixed by law for holding said term, there were present Hon. Geo. F. Moore, chief justice, Hon. Robert S. Gould, associate justice, Hon. M. H. Bonner, associate justice, W. P. de Normandie, clerk, Ed. Creary, sheriff of Travis County, and ex-officio sheriff to supreme court.

Among other, the following proceedings were had:

SATURDAY, *April* 23, 1881.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE STATE OF TEXAS. } 4380. Appeal from Travis.

Set for May 9th, subject to business of 3d assignment.

Afterwards, the following proceedings were had, to wit:

MONDAY, *May* 8, 1881.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE STATE OF TEXAS. } 4380. Appeal from Travis.

Set for the 18th inst.

32 And afterwards, the following proceedings were had, to wit:

WEDNESDAY, *May* 18, 1881.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE STATE OF TEXAS. } 4380. Appeal from Travis.

Argument commenced.

And afterwards, the following proceedings were had, to wit:

THURSDAY, *May* 19, 1881.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE STATE OF TEXAS. } 4380. Appeal from Travis.

Argument concluded, and cause submitted on briefs and oral arguments of both parties.

And afterwards, the following proceedings were had, to wit:

TUESDAY, *June* 14, 1881.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE STATE OF TEXAS. } 4380. Appeal from Travis.

Judgment reformed in so far as it allows interest; in all other respects affirmed.

And afterwards, the following proceedings were had, to wit:

TUESDAY, *June* 14, 1881.

THE WESTERN UNION TELEGRAPH COMPANY vs. THE STATE OF TEXAS. } 4380. Appeal from Travis.

Opinion by Mr. Justice Gould.

33 This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below, in allowing interest on the amount recovered, it is considered, adjudged, and ordered that the judgment of the court below be in all things affirmed, except in so far as the amount allowed for interest, and this decision be certified below for observance.

The following is the opinion delivered on the judgment of the court, by Mr. Justice Gould, in the cause of The Western Union Telegraph Company vs. The State of Texas.

34 THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE STATE OF TEXAS. } No. 4380.

This is a suit brought in the district court of Travis County by the State, against appellants, for taxes alleged to be due for the quarter years, October, November, and December, 1879; January, February, and March, and April, May, and June, 1880; and to compel a report and compliance by defendant with the terms of article 4655, of the Revised Statutes of Texas, where it is provided that: "There shall be levied on and collected from every person, firm, company *of* association of persons pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation or separate establishment, as follows: * * * From every chartered telegraph company doing business within this State there shall be collected one cent for every full-rate message, and one-half that for
35 every message less than a full-rate message sent, this tax to be paid quarterly to the comptroller, on the sworn statement of the chief manager of said company or companies, who shall keep a record of such messages." Defendant answered by demurrer and general denial, and pleaded that the law imposing the tax was void under the State and Federal constitutions and acts of Congress. The case was tried by the court, March 11, 1881, resulting in an order of court requiring defendant to file a sworn statement of the number of messages sent during the quarters named, and judgment against the defendant for the taxes thereon, with interest, in the sum of $2,305.91. Defendant appealed. The court filed statement of conclusions of fact and law. From these conclusions of fact it appears that the appellant was incorporated; did business as a chartered telegraph company in the State, its lines extending to nearly all the States of the Union and to Washington City. The court finds the number of full-rate and half-
36 rate messages sent within the period stated in the petition, and states that this number "includes messages sent from Western Union Telegraph offices within Texas to points, within the United States, both within and out of Texas, and part of which related to commerce between Texas and other States of the Union." The court also found that the number of messages above set forth, and on which the amount of taxes found due was based, included messages (the number of which was not shown), sent from the government officers and agents of the United States in Texas to other officers, agents, or departments of said United States Government. That a large proportion of messages sent belonged to the classes above mentioned. That Gen. B. C. Ludlow, collector of internal revenue, third district, used the company as means of communication with the government and with other officers; used it every week, at special rates fixed by the Post-Office Department. It was also pleaded by defendant and found by the
37 court that on June 12, 1867, the defendant, in pursuance of an act of Congress of the United States entitled "An act to aid in the construction of telegraph lines, and to secure the use of the same for postal, military, and other purposes," approved July 24, 1866, filed in the office of the Postmaster-General, the full and

proper acceptance of defendant of the terms of said act. That the rates for United States Government messages on defendant's lines had been fixed by the Post-Office Department at one cent per word for each five hundred miles of transmission. Also, that the United States Government has in Texas a line of telegraph, called the military telegraph, owned by the government, and the lines of defendant connect with and are used in transmission of messages by the Government of the United States and its officers, in connection with the military telegraph lines, and messages so transmitted (number not shown) are included in the number on which the judgment of the court below is based. The constitution of this State authorizes the legislature to "impose
38 occupation-taxes, both upon natural persons and upon corporations other than municipal, doing any business in this State," and although telegraph companies may be subject to Congressional regulation, they are also subject to pay legitimate occupation-taxes to the State, at least until Congress shall otherwise provide. The occupation-tax in this case is proportioned to the number of messages sent, and seems to us designed to graduate the burden according to the amount of business done, and on principle to be free from objection as obstructing or regulating inter-State commerce. Such an occupation-tax, proportioned to the business done, regardless of any distinction between business done wholly within the State and business done in part without the State, conforms to the rule recognized by the Supreme Court of the United States in attempting to mark out the boundaries of legitimate State taxation on the one side and a regulation of inter-State commerce on the other. Case of the State Freight Tax, 15 Wallace, 232;
39 State Tax on Ry. Gross Receipts, Id., 285; Osborne v. Mobile, 16 Wallace, 479. See also Western Un. Tel. Co. v. City of Richmond, 26 Grattan, 1; Same v. Meyer, 28 Ohio St., 523. In the freight tax case the tax was regarded, not as a tax on the business or franchise, but as a tax on the thing carried, and the burden falling on the consignor or consignee. Here the tax is on the occupation, not on the transportation of an article which is a subject of commerce, and although it may, like a tax on gross receipts, increase the expense of telegraphic communication, the burden falls directly on the company, and the burden on the senders of messages is not affected otherwise than it would necessarily be by any species of taxation on the occupation or business of the company. But it is not designed to attempt a review of the cases or a discussion of the subject. Referring to the authorities cited above, and especially to the opinion in West. Un. Tel. Co. vs. City of Richmond, supra, we content ourselves with anouncing our conclusion that the tax in
40 question is not invalid as a regulation of inter-State commerce, nor as a tax affecting government agencies or business. On the latter point see Thompson v. R. R. Co., 9 Wallace, 591, and Nat. Bank v. Commonwealth, 9 Wallace, 353. The objection that the tax violates the law of uniformity, as prescribed by the constitution of the State, is not regarded by us as tenable, or as requiring further notice than a reference to previous decisions. Tex. B. & I. Co. v. State, 42 Tex., 639. But the court gave judgment for interest on the taxes from the first of January of each year after they fell due. The rule is said to be that, "Where action is given for taxes, interest is not recoverable, unless the statute gives it." Conley on Taxation, p. 300, note 4; also Id., pp. 13, 14; Danforth v. Williams, 9 Mass., 324; Shaw v. Pickett, 26 Vt., 482; Heard v. City of Galveston, Galveston term, 1881. Until the leg-
41 islative will has been expressed, that the burden on the tax-payer shall be thus increased, interest should not be allowed. Taxes

are distinguishable from ordinary debts bearing interest. The judgment will be reformed in so far as it allows interest, but in all other respects it is affirmed.

ROBERT S. GOULD,
Assoc. Just.

(Endorsed:) No. 4380. The Western Union Telegraph Company vs. The State of Texas. Opinion. Robert S. Gould, assoc. just. Filed in supreme court, at Austin, June 14, 1881. W. P. de Normandie, clerk.

42 CLERK'S OFFICE, SUPREME COURT,
Austin, July 8, 1881.

I, W. P. de Normandie, clerk of the supreme court of Texas, at Austin, hereby certify that the preceding ten and one-half pages contain a true and correct copy of the orders, the judgment of the court, and the opinion delivered by Mr. Justice Gould in the cause of The Western Union Telegraph Company vs. The State of Texas.

Witness my hand and the seal of said court, at Austin, the day and year above written.

[SEAL.] W. P. DE NORMANDIE,
Clerk Supreme Court.

43 In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, plaintiffs in error,
vs.
THE STATE OF TEXAS, DEFENDANT IN ERROR.

Know all men by these presents that we, The Western Union Telegraph Company, as principal, and Norvin Green, of the city, county, and State of New York, as surety, are held and firmly bound unto the State of Texas in the sum of four thousand seven hundred dollars, to be paid to the said The State of Texas, and to the payment whereof, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, assigns, heirs, executors, administrators, and legal representatives, firmly by these presents. Sealed with our seals and dated July 22nd, A. D. 1881.

Whereas the above bound The Western Union Telegraph Com-
44 pany, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the supreme court of Texas in a certain cause wherein the Western Union Telegraph Company was appellant and the State of Texas appellee, on appeal from the district court of Travis County, State of Texas, and wherein the State of Texas recovered a judgment of said district court against the Western Union Telegraph Company, on the 10th day of March, 1881, for the sum of two thousand three hundred and five and $\frac{91}{100}$ dollars, and costs of suit, which judgment was, on appeal, affirmed by said supreme court of Texas, except as to one hundred and eight and $\frac{11}{100}$ dollars thereof, so that said judgment was reduced by said supreme court to the sum of two thousand one hundred and ninety-seven and $\frac{80}{100}$ dollars, and costs.

Now, therefore, the condition of this obligation is such that, if the bound, the Western Union Telegraph Company, shall prosecute
45 its said writ of error to effect, and answer all damages and costs

if it shall fail to make good its plea, then shall this obligation be void; otherwise to remain in full force and virtue.

{ W. U. T. CO. SEAL. } THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *Pres't.*
NORVIN GREEN. [SEAL.]

Attest:
WM. N. BAKER, *Acting Sec'y.*

Approved July 23rd, 1881.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

Sealed and delivered in presence of—
WM. J. HARDING.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

Norvin Green, surety in the foregoing bond, being duly sworn, upon oath says that he is worth the sum of ten thousand dollars over and above his just debts and liabilities, and exclusive of property exempt by law from execution.

NORVIN GREEN.

46 Subscribed to in my presence and sworn to before me by the above-named Norvin Green.

In testimony whereof I have hereunto set my hand and seal of office this 22nd day of July, A. D. 1881.

[SEAL.] WM. J. HARDING,
Notary Public, Kings County, State of New York.

(Certificate in New York County.)

STATE OF NEW YORK,
Southern District of New York, ss:

On this 22nd day of July, A. D. 1881, before me, the undersigned, a notary public of the State of New York, came in person Norvin Green, well known to me to be the president of the Western Union Telegraph Company, a corporation described in and which executed the above obligation as principal, and also known to me to be the same person described in and who as surety individually executed the above
47 bond or obligation; and the said Norvin Green acknowledged that he executed the same as such president as and for the act and deed of the said Western Union Telegraph Company, and that he also executed the same individually.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal, at the city of New York, the day and year aforesaid.

[SEAL.] WM. J. HARDING,
Notary Public, Kings County, State of New York.

(Certificate filed in New York County.)

THE STATE OF TEXAS:

I, W. F. de Normandie, clerk of the supreme court of said State, hereby certify that the preceding four pages and portion of this page contain a true copy of the writ of error bond, and of the authentica-

tion of the same, executed in a certain cause or writ of error from the Supreme Court of the United States to the supreme court of
48 *of* the State of Texas, No. 4380, wherein the Western Union Telegraph Company was appellant, from the district court of Travis County, Texas, and the State of Texas was appellee, as fully and completely as the original bond remains now on file in this office.

Given under my hand and seal of said supreme court, at Austin, this 13th day of August, A. D. 1881.

[SEAL.] W. P. DE NORMANDIE, *Clk*,
By H. F. FOLWELL, *D'p'ty*.

49 To the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States:

The petition of the Western Union Telegraph Company complains, that in the record and proceedings, and also in the rendition of judgment, in a suit between the State of Texas, plaintiff, and the said The Western Union Telegraph Company, defendant, in the supreme court of Texas, the said court being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which final judgment was rendered against the said The Western Union Telegraph Company on the 14th day of June, A. D. 1881, there was drawn in question the validity of a statute of the said State of Texas, on the ground *that* said statute being repugnant to the Constitution and laws of the United States, and the decision of said court was in favor of the validity of said statute and against the privileges and immunities claimed by petitioner, under the Constitution and laws of the United States, as is apparent in the record and proceedings in said suit herewith presented for your honor's inspection, and that therein manifest error hath happened to the great injury of petitioner:

Wherefore it prays your honor to examine said record, and thereupon allow a writ of error in said cause from the Supreme Court of the United States to the said the supreme court of Texas, and for all such other process as will cause the said judgment to be corrected in the Supreme Court of the United States, pursuant to the acts of Congress of the United States in such cases made and provided.

THE WESTERN UNION TELEGRAPH COMPANY.
WAGER SWAYNE, *Att'y*.

50 THE UNITED STATES OF AMERICA, *ss*:

[SEAL.] The President of the United States to the honorable the judges of the supreme court of Texas, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said court of Texas, before you or some of you, being the highest court of law or equity of the said State of Texas in which a decision could be had in the said suit, between the Western Union Telegraph Company, plaintiffs in error, and the State of Texas, defendant in error, wherein was drawn in question the validity of a statute of said State of Texas, on the ground of said statute being repugnant to the Constitution and laws of the United States, and the decision of said court was in favor of the validity of said statute, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the privileges and immunities claimed by the said Western Union Telegraph Company, and by it specially set up and claimed un-

der such clause, a manifest error hath happened, to the great injury and damage of said The Western Union Telegraph Company, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment
51 be there in given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there holden; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed July 23, 1881.

M. R. WAITE,
Chief Justice Sup. C't U. S.

52 CLERK'S OFFICE, SUPREME COURT,
Austin, Texas, September 1st, 1881.

I, W. P. de Normandie, clerk of the supreme court of Texas, at Austin, hereby certify that a true copy of the foregoing writ of error remains on file in my office in said cause.

Witness my hand and the seal of said court annexed, at Austin, the day and year above written.

[SEAL.] W. P. DE NORMANDIE, *Clk*,
P'r ALEX. LAMONT, *D'p'y.*

53 UNITED STATES OF AMERICA, *ss:*

To the State of Texas, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Texas, wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 23d day of July, in the year of our Lord one thousand eight hundred and eighty-one.

M. R. WAITE,
Chief Justice Sup. C't U. S.

I hereby accept service of this writ of citation and acknowledge receipt of a true copy thereof duly served on me this the second day of August, A. D. 1881.

J. H. M. LEAVY,
Attorney-General of the State of Texas.

54 CLERK'S OFFICE, SUPREME COURT,
Austin, Texas, Aug. 5th, 1880.

I, W. P. de Normandie, clerk of the supreme court of Texas, bereby accept service of this citation, and acknowledge receipt of a true copy thereof duly served on me.

Witness my hand and the seal of said court the day and year above written.

[SEAL.] W. P. DE NORMANDIE, *Clerk.*

(Indorsed:) United States Supreme Court. Western Union Tel. Company, pl'ff in error, vs. The State of Texas, defendant in error. Petition of Western Union Tel. Company. Writ of error, citation, and bond. Wager Swayne, att'y.

(Indorsement on cover:) No. 902. The Western Union Telegraph Company, plaintiff in error, vs. The State of Texas. Texas supreme court. Filed 15' September, 1881.

IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

AGAINST

THE STATE OF TEXAS, Defendant in Error.

No. 208.

BRIEF FOR PLAINTIFF IN ERROR.

WALTON, GREEN & HILL,
Solicitors.

JOHN F. DILLON,
WAGER SWAYNE,
of Counsel.

J. L. Pearson, Printer, 519 and 521 9th, Washington.

IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *against* THE STATE OF TEXAS, DEPENDANT IN ERROR.	No. 902.

Brief for Plaintiff in Error.

The State of Texas imposes by law a double tax upon telegraph companies doing business within that State.

First, the lines and property are assessed and taxed at their full value.

Second, a tax on messages of one cent for every full-rate message sent, and one-half cent for every message sent for less than a full rate, is levied as an "occupation" tax.

The first of these taxes the plaintiff in error pays, and has paid, without complaint.

It excepts to the second as imposing an unlawful restriction upon commerce between the States, and upon the use of its lines by the government of the United States.

The record discloses that the greater portion of the messages herein considered pass the State line, and that very many of them are at the expense of the United States.

It discloses, moreover, that the company is by law required to transmit the messages of the United States at such rate as the Postmaster-General may determine.

The statute taxing the company on its lines, and that taxing the messages, are respectively as follows:

"ART. 4,678. All railroad, telegraph, plank-road, and turnpike companies shall list all of their real and personal property, giving the number of miles of road-bed and line in the county, where such road-bed and line is situated, at the full and true value, except when such company may own personal property or real estate in an unorganized county or district; then they shall list such property to the comptroller."

"ART. 4,665. From every chartered telegraph company doing business within this State, there shall be collected one cent for every full-rate message, and one-half that for every message less than a full-rate message, sent; this tax to be paid quarterly to the comptroller, on the sworn statement of the chief manager of said company or companies, who shall keep a record of such messages, and the receipt of the comptroller, under seal, shall be issued to said company or companies, certified copies of which shall be evidence of the payment of the State tax: *provided*, railroad messages, for running their trains and for company use, shall not be taxed; *provided further*, that nothing herein contained shall authorize the levy or collection of any county or municipal tax upon any such chartered company for messages sent."

So much of the opinion of the Supreme Court of Texas, as is here presented for review, is comprised within the following:

"The constitution of this State authorizes the Legislature to 'impose occupation taxes, both upon natural persons and upon corporations other than municipal, doing any business in this State,' and although telegraph companies may be subject to congressional regulation, they are also subject to pay legitimate occupation taxes to the State, at least until Congress shall otherwise provide. The occupation tax in this case is proportioned to the number of messages sent, and seems to us designed to graduate the burden according to the amount of business done, and on principle to be free from objection as obstructing or regulating inter-state commerce. Such an occupation tax, proportioned to the business done, regardless of any distinction between business done wholly within the State and business done in part without the State, conforms to the rule recognized by the Supreme Court of the United States in attempting to mark out the boundaries of legitimate State taxation on the one side and a regulation of inter-state commerce on the other.

"Case of the State Freight Tax, 15 Wallace, 232.

"State Tax on Railway Gross Receipts, Id., 285.

"Osborne vs. Mobile, 16 Wallace, 479.

"See, also, Western Un. Tel. Co. vs. City of Richmond, 26 Grattan, 1.

"Same vs. Myer, 28 Ohio St., 523.

"In The Freight Tax Case the tax was regarded, not as a tax on the business or franchise, but as a tax on the thing carried, and the burden falling on the consignor or consignee. Here the tax is on the occupation, not on the transportation of an article which is a subject of commerce, and although it may, like a tax on gross receipts, increase the expense of telegraphic communication, the burden falls directly on the company and the burden on the senders of messages is not affected otherwise than it would necessarily be by any species of taxation on the occupation or business of the company. But it is not designed to attempt a review of the cases or a discussion of the subject. Referring to the authorities cited above, and especially to the opinion in West. Un. Tel. Co. vs. City of Richmond, supra, we content ourselves with announcing our conclusion that the tax in question is not invalid as a regulation of inter-state commerce, nor as a tax affecting government agencies or business. On the latter point see—

"Thompson vs. R. R. Co., 9 Wallace, 591, and

"Nat. Bank vs. Commonwealth, 9 Wallace, 353."

The "principle" here relied upon is not explained. The position taken by the court embraces the following propositions:

1. The tax in question is an "occupation tax," that is, a tax upon the occupation or business of the company.

2. Such a tax, if imposed regardless of any distinction between business done wholly within the State and business done partly without the State, is not invalid as a regulation of inter-state commerce, nor as a tax affecting government agencies or business.

Appellant's propositions, on the contrary, are as follows:

1. This tax is not upon the business of the company, but upon the messages themselves, which are part of the intercourse of commerce.

2. As such, it is invalid as a regulation of commerce, and is not relieved by the fact that it makes no distinction between messages carried wholly within the State and those which cross the State line.

3. Further, the business of the company itself is commerce, and, so far as it is business done in part "without

the State," is equally beyond the jurisdiction of the State to levy taxes on it.

4. The record discloses such relations between the government and the company as make the company an agency of the government and cause the business of the government to be directly affected by the tax.

The first issue raised by these propositions is whether this second tax be in fact only upon the business of the company, or penetrates directly to the messages themselves.

It is apparently conceded, and is true, that if the law imposes a direct tax on messages, it is a regulation of that method of intercourse.

It will then remain to be seen whether that intercourse is commerce; and if so, whether a regulation of commerce which would be invalid if applied to inter-state commerce alone, becomes, as to such commerce, valid, when it applies with equal force to commerce wholly within the State.

In determining whether the tax in question is a tax on messages or merely on the business of the company transmitting them, the court below grounds its decision upon an alleged ruling of this court. The language of this court is not given nor any explanation in detail. The cases are cited by reference merely. The tax is said to be "upon principle free from objection," but upon what principle is not said. It is expressly stated that a review is not proposed.

The cases cited are the "*Case of the State Freight Tax*," 15 *Wallace*, 232, and the "*State Tax on Railway Gross Receipts*." 15 *Wallace*, 284.

In the first of these cases, a law of Pennsylvania, requiring transportation companies to pay "on each two thousand pounds of freight so carried," without exempting freight which passed the State line, was pronounced in-

valid, as an attempt by the State to regulate commerce between the States. In this case the court say:

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid.

"Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business, measured by the number of tons of freight carried. The companies are required to pay to the State treasurer, for the use of the Commonwealth, 'on each two thousand pounds of freight so carried,' a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight."

In the second and subsequent case, a law of the same State imposing upon the same companies a tax *not in proportion to the business done, but in proportion to the income from the business*, was upheld principally on the ground that the tax was imposed only on the company's general estate, and not until after the fund in question had become part of that estate.

"When, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed, such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. *Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property.*"

The vital character of this distinction has since been emphasized by this court:

"If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated."

Welton vs. State of Missouri, 91 U. S. (1 Otto), 275, 281.

The parallel between the Pennsylvania law, which was pronounced invalid, and the Texas law now under consideration, is both exact and clear.

The Pennsylvania law reads:

"Each of the companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz:

"First. On the products of mines, quarries, and clay-beds, in the condition in which said products may be taken therefrom, 2 cents.

"Second. On hewn timber, animal food, including live-stock; also on the products of the forest, vegetable, and other agricultural products, the value of which has not been increased by labor, 3 cents.

"Third. On all other articles, 5 cents."

The Texas statute reads as follows:

"There shall be levied on and collected from every person, firm, company, or association of persons pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation or separate establishment, as follows: . . . From every chartered telegraph company doing business within this State there shall be collected one cent for every full-rate message, and one-half that for every message less than a full-rate message sent, this tax to be paid quarterly to the comptroller, on the sworn statement of the chief manager of said company or companies, who shall keep a record of such messages."

To understand the parallel, apply the language of this court in the *case of the State Freight Tax.*

"The companies are required to pay . . . on each 'two thousand pounds of freight so carried a tax at the 'specified rates. This tax is not proportioned to the busi- 'ness done in transportation. It is the same whether the 'freight be moved one mile or three hundred." The messages move along the line of a telegraph exactly as freight along a railroad. Substitute "messages" for "freight," and the language above used exactly describes

the operation of the Texas law. The State does not wait, as in the *State Tax on Railway Gross Receipts*, "to tax the 'fruits of such transportation after they have become in-'termingled with the general property of the carrier. . . " It was upon this distinction that the tax in that case was upheld. It would be lost entirely if the tax in this case were upheld.

The grounds upon which the Supreme Court of Texas reach an opposite conclusion are not given. "It is not 'designed to attempt a review of the cases or a discussion 'of the subject. Referring to the authorities cited above, 'and especially to the opinion in West. Un. Tel. Co. vs. 'City of Richmond, (26 Grat., 1,) we content ourselves 'with announcing our conclusion that the tax in question 'is not invalid as a regulation of inter-state commerce, 'nor as a tax affecting government agencies or business."

The case here especially relied on sustains an ordinance requiring annual payment by the company of a license fee. It is later than the two cases above discussed, and having those cases in view, the court is careful to distinguish that the amount of the tax in that case is not, as in this case, determined by a reference to the account of messages.

"The tax is not upon the telegraph message or communication, but upon the company, measured by the business in the corporate limits."

This case, decided in 1875, is also put expressly upon the ground that "telegraphic communication is not commerce." This position, taken adversely to all that current of authorities which define commerce as including all the agencies and intercourse by which it is maintained, was two years later finally disposed of by this court in *Pensacola Tel. Co. vs. W. U. Tel. Co.*, hereinafter cited. The Virginia court speaks of the telegraph as merely an *instrument* of commerce, as a ship is, and in the same way taxable. In the case at bar, the *telegraph*, the instrument, has been already taxed—this tax is additional, upon communi-

cations which are made by means of the telegraph the instrument. These are intercourse,—and commerce.

"Commerce with foreign nations, and among the several States, can mean nothing more than intercourse with those nations and among those States, for the purposes of trade, be the object of the trade what it may, and thus intercourse must include all the means by which it can be carried on."

Corfield vs. Coryell, 4 Wash. C. C., 379.

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms. . . . . The power to regulate it embraces all the instruments by which such commerce may be conducted."

Welton vs. State of Missouri, 91 U. S., 275, 280 (1875). Opin. by FIELD, J.

It is as if the State, having already taxed the ship at its home port on its full value, imposed a further tax, beyond port charges upon each arrival and departure. It is easily determined whether this would be a restriction upon commerce.

"It is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving or departing from a port of the United States, is within the prohibition."

Cannon vs. New Orleans, 20 *Wall.*, 577, 581 (1874).

"Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same. Corresponding views are expressed by Mr. Burroughs in his valuable treatise upon taxation. He says that vessels of all kinds are liable to taxation as property in the same manner as other personal property owned by citizens of the State; that the prohibition only comes into play where they are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property."

Transportation Co. vs. Weeeling, 99 U. S., 273, 284 (1878). Opin. by *Clifford*, J.

In Minot vs. P. W. & B. R. R. Co., 2 Abbott's U. S. Rep., 340, Mr. Justice Strong, then of this court, held

that the entire property of a railroad company engaged in inter-state transportation might be taxed by the State as property, but that provisions of the same law, imposing an annual tax upon locomotives and cars in use on the same railroad, were an imposition on commerce and for that reason unconstitutional and void.

The Ohio case, relied upon in the opinion under review, discriminates as carefully as the Virginia case with reference to a tax on messages, such as the case at bar involves.

> "This law does not impose a tax on messages, but on the gross receipts of a previous period of time, and so is within *The Delaware R. R. Tax*, 18 *Wall.*, cited above."—(W. U. Tel. Co. vs. Mayer, 28 Ohio St., 521, 533.)

The only remaining case cited upon this point in the judgment here appealed from, is *Osborn vs. Mobile*, 16 *Wall.*, 479.

The subject-matter of that case was a license fee exacted by the city of Mobile from every railroad and express company doing business within its limits. The charge was higher upon those companies whose business extended beyond the State.

The tax was sustained expressly upon the ground that it was upon the business of the company. The two cases in 15th Wallace, above cited, were then fresh in the court's mind, and the court say:

> "In the second of the cases recently decided, [State Tax on Gross Receipts,] the whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed."
>
> "The case now before us seems to come within this principle.
>
> "The license tax in this case was upon a business carried on within the city of Mobile."

Instead of being supported by the authorities relied on, the opinion under review stands apparently alone and in conflict with all others, in upholding *a tax proportioned directly to the use made of an agency of commerce, as distinguished from a tax proportioned to the income derived from its use.*

The opinion is expressly grounded upon authority alone. No reasoning is given. The reasoning of the authorities relied on supports the opposite conclusion.

Apparently the true distinction between tax which is on goods in transit or on intercourse, and so on commerce, and a tax which is upon the business of an agency of commerce, is that the measure of the tax, to be a tax on business, must be the income from the business. If the tax be measured by the goods transported or the intercourse, it is upon the goods themselves, or on the intercourse, and so a tax on commerce.

The measure of taxation, in the case at bar, is simply the number of messages transmitted. The company makes a business of transmitting messages for money. The measure of its business is the money it receives. This is determined, not entirely by the number of the messages, but also by their length and distance carried. All these affect that result which is the measure of the business. No one of them alone affords a measure of the business. The amount of the tax in the case at bar is to be determined by measure. The measure prescribed will measure the messages, and will not measure the business. How can it be said to be a tax upon the business and not upon the messages? It is certainly not "a tax proportioned to the business done."

The company, moreover, may do business upon credit, and so fail of its receipts from many messages. If the law stand, it must still pay the tax upon these messages. How, then, can it be said that distinction is observed, which this court has elsewhere pronounced vital, that the tax may be imposed only after the funds themselves have been fused with the general estate?

It seems to be clear that if the messages themselves be commerce, the law now considered is a tax upon that commerce.

In one of the cases relied upon in the opinion under review, *W. U. Tel. Co. vs. Richmond*, 26 *Grattan*, 1, it is said that—

"The mistake made in all this class of cases is in failing to distinguish between commerce itself and what may be termed a mere instrument of commerce. Telegraphic communication is not commerce; it is not a subject of trade and barter offered in market as something having an existence and value independent of the parties to them. It is not an intercourse, though it may be, and doubtless is, an important and valuable instrument or agency by which intercourse is carried on between the different parts of the country."

This case was decided in 1875. Two years later, in *Pensacola Tel. Co. vs. W. U. Tel. Co.*, 96 U. S., 1, this court expressed itself as follows:

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without useing the telegraph freely to secure information."

"It is not only important to the people, but to the government. By means of it, the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interests they have in charge. *Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation.*"—(96 *U. S.*, 1.)

The true distinction is between the telegraph and telegraphic messages; between the instrument of commerce and the use made of that instrument. The telegraph, the posts and wires and batteries, are collectively an instrument of commerce. The messages, the intercourse by means of such an instrument, are commerce.

"Commerce undoubtedly is traffic; but it is something more, it is *intercourse*. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Gibbons vs. Ogden, 9 Wheat. R., 189. Opinion by Chief Justice *Marshall*.

The opinion under review, after deciding that the tax imposed is not on commerce but upon the business of the company, speaks also of such a tax as free from objection as a tax on commerce, if imposed "regardless of any distinction between business done wholly within the State, and business done in part without the State."

This apparently means that a tax, which is in reality a tax upon inter-state commerce, will be relieved of the objection on that score, if imposed to the same extent upon commerce wholly within the State. This view has been often urged in argument, and as often denied by the courts. It was denied by this court in the *Case of the State Freight Tax, supra*.

"The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State, any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State."

Upon the foregoing review, it seems that the tax now considered plainly does not conform to the distinction admitted by this court in the two cases of the *State Freight Tax* and the State Tax on Gross Receipts, that a tax upon the business of a company engaged in commerce is not a tax on commerce. The court is invited to decide that a tax is still a tax upon the *business* of such companies, though the tax is not proportioned to the business done, but its amount is fixed by some dimension of the commerce transacted through its agency.

The distinction already admitted is perhaps not entirely clear. The suggestion in *Osborne vs. Mobile*, (*supra*,) that all the members of the court were agreed to it is certainly to be taken in the sense that all were agreed to it only when the business of the carrier was transacted entirely within the State. The agreement was said to have been reached in the case of the "*State Tax on Gross Receipts.*" In that case the dissenting opinion of Justices Miller, Field, and Hunt is certainly explicit as to the sense in which the court could be said to be agreed:

"A railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely, or incidentally, connected with commerce, *the business of roads and canals, namely, transportation of persons and property, is itself commerce.* So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control.

"*I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll for the privilege of having their goods transported through that State by the ordinary channels of commerce.* And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then."

Here is a contrast of distinctions. It was held by this court, starting from the axiom that a State may not impose a tax on commerce between the States, it was clear that a tax of so much per ton of freight carried was invalid, as a tax on commerce, though assessed only to the carrier. This distinction was, however, allowed: that if the tax, instead of being so much per pound carried, were so many per cent. of receipts from pounds carried, then it might be enforced as a tax only on the carrier.

Contrast with this narrow and shadowy distinction that broad and clear one which is opposed to it: "A railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this: that while their business is only remotely or incidentally connected

with commerce, *the business of railroads and canals, namely, transportation of persons and property, is itself commerce.*"

It is certain that, with this last distinction in force, a particular species of inter-state commerce could not be taxed out of existence; it is hard to see how the other would be sufficient to prevent it. This is the true and necessary test—full of import for the future.

The whole current of previous decision, as reviewed in the *State Freight Tax Case*, is adverse to the first of these distinctions. In view of the doubt which still prevails as to its force, and the use made of it in this case, appellant ventures to suggest its reconsideration by the court.

It is deemed necessary to suggest this, not because it is necessary to a reversal of the decree below, but because the decree below illustrates at once the facility with which the distinction which has been admitted may be misconstrued and the dangers which it may be said to allow.

As has been already said, the opinion under review, after deciding that the tax imposed is not on commerce, but upon the business of the company, speaks also of such a tax as free from objection as a tax on commerce, if imposed "regardless of any distinction between business done wholly within the State, and business done in part without the State."

It is, perhaps, true that a tax exclusively upon "business done in part without the State" would be invalid as a tax on commerce, and because of this exclusive character, but it is not plainly true. If the business itself be not commerce, it is hard to see how a tax on any part of it can be a tax on commerce. If a tax upon the business, which applies to the whole, and includes "business done in part without the State," be not as to any part of it a tax on commerce, it is hard to see how a separate tax on any part of it can be so.

If the business of a company be not commerce, so that no tax on any part of it would be a tax on commerce, it follows that the State may lay a tax exclusively upon that

portion which is "business done in part without the State." The State, in other words, may make this "business," *i. e.*, transportation, more expensive than that "done wholly within the State." And as the power of the State to tax, where it exists at all, exists entirely free from jurisdiction of this court, it follows that prohibitory taxes may annihilate the "business done in part without the State," while at the same time "business done wholly within the State" is left entirely free. The business of a company either is or is not commerce. If it is commerce, it cannot, where it is inter-state, be taxed. If it is not commerce, the State holds over it the power of limitless taxation.

"The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

Welton vs. State of Missouri, 91 U. S. (1 Otto), 275, 281.

The truth appears to be that the property of a concern which is an agency of commerce may be taxed at the discretion of the State, because whatever may be thereby added to the cost of commerce falls alike on every portion of the use; but that the State can lay no tax at all upon a business which is inter-state, because whatever is within the State's control is so exclusively, and if control be once admitted, there is then no power to restrain discrimination.

The record discloses that the company, plaintiff in error, has entered into an irrevocable contract with the United States under Title LXV, Revised Statutes, and that large use is made by the government of the following provision:

Sec. 5,266. "Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the

right of way, timber, or station lands from the public domain, shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

The discretion here vested in the Postmaster-General is plainly not susceptible of capricious or arbitrary exercise. It is a judicial discretion, to be exercised in furtherance of justice. The company, in consenting to it, has simply stipulated that the government may for itself determine a just and reasonable compensation for the service rendered. It seems obvious that any increase in the cost of rendering the service makes it but just that there shall be an increase in the compensation. The government is bound by this requirement of justice.

The law under consideration requires the company to pay to the State a specific sum "for every message sent," though sent at the expense of the United States. This sum the State may increase at its will, to a sum, if it please, beyond the whole compensation at present fixed by the Postmaster-General. That officer cannot use his discretion to require the company to do business at a loss or receive less than it pays out in taxes. The case, therefore, as to these messages, presents the imposition by the State of Texas of a tax directly payable, and of necessity, by the United States.

The precise number of these messages is not disclosed by the record, ~~as is also~~ nor the precise amount of tax demanded on them. The decree ~~specifically~~ refuses ~~to abate this sum.~~ any abatement on this ground.

In so refusing, the opinion below relies upon the cases of *Nat. Bank* vs. *The Commonwealth*, *9th Wallace*, 353, and *Thompson* vs. *R. R. Co.*, *9th Wallace*, 591. None others are cited, and as with regard to the other federal questions in the case, it is expressly stated that "it is not designed to attempt a review of the cases or a discussion of the subject.

The first of these cases presented for consideration a tax on the shares of a national bank. The second a tax on a railroad built by the aid of the United States. In each it was decided that although an agency of the United States might not *in that capacity* be taxed, its property was subject to taxation which did not impede its usefulness to the United States. Precisely this view has been since more fully defined.

"It is, therefore, manifest that exemption of federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

Railroad Co. vs. Peniston, 18 Wall. R., 36.

The tax here imposed is a specific sum for each time the machinery of telegraphing is put in operation for the use of the United States. It is directly "a tax upon the operations of the federal government." Moreover, the circumstances make it a tax payable specifically by that government itself. It makes no difference that the tax is small.

"A question of constitutional power can hardly be made to depend on a question of more or less."

McCulloch vs. Maryland, 4 Wheat., 316.

WAGER SWAYNE,
For Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY

vs.

THE STATE OF TEXAS.

No. 902.

Brief for Defendant in Error.

The Constitution of the State of Texas, adopted 25 November, 1875, provides, Article VIII., Section 1: "Taxation shall be equal and uniform. All property in the State, whether owned by natural persons or corporations (other than municipal) shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll-tax. It may also impose occupation-taxes upon natural persons and upon corporations, other than municipal, doing any business in this State," &c., &c.

Section 2 provides: "All occupation-taxes shall be equal and uniform, upon the same class of subjects, within the limits of the authority levying the tax," &c., &c.

By Article 4,655, Rev. Stats. Texas, it is provided:

"There shall be levied on, and collected from, every person, firm, company, or association of persons, pursuing any of the following-named occupations, an annual tax (except when herein otherwise provided) on every such occupation or separate establishment, as follows: * * * *

"From every chartered telegraph company doing business within this State, there shall be collected one cent for every full-rate message, and one-half that for every message less than a full-rate message sent. This tax to be paid quarterly to the Comptroller, on the sworn statement of the chief manager of said company or companies, who shall keep a record of such messages."

pp. 672, 676.

By the act of 22 April, 1879, it is added that "the receipt of the Comptroller, under seal, shall be issued to said company or companies, certified copies of which shall be evidence of the payment of the State tax."

pp. 143, 147.

Under these constitutional and statutory provisions, an action was brought against the Telegraph Company in the District Court of the State for the County of Travis, to recover the taxes due to the State, and to compel the Company to make the report of the messages sent, as required by law.

The defendant insisted that the act of the Legislature was an attempted interference with commerce between the State of Texas and other States of the United States—and was therefore void.

That this act was also in conflict with the act of Congress 24 July, 1866, entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government the use

of the same for postal, military, and other purposes;" which had been duly accepted by the Company, and had thus become entitled to all the privileges, and subject to all the obligations, of said act, as provided for in Title LXV. of the Revised Statutes.

p. 1,019.

It was also insisted that the tax was not uniform, and was unequal, and for this reason the act violated the Constitution of the State.

On the trial a jury was waived, and, on the facts found by the court, judgment was rendered for the State—the Court holding "the State law efficient as imposing an occupation-tax, graded by the number of times the apparatus of the Company was used in the transmission of messages in its business."

An appeal was then taken to the Supreme Court, where the judgment was affirmed. To reverse this judgment, the present writ of error is prosecuted.

In the opinion of the Supreme Court, it is said that the Constitution of the State authorizes the Legislature to impose "occupation-taxes," and "although telegraph companies may be subject to congressional legislation, they are also subject to pay legitimate occupation-taxes to the State—at least until Congress shall otherwise provide."

"The occupation-tax in this case is proportioned to the number of messages sent, and seems to us designed to graduate the burden according to the amount of business done, and on principle to be free from objection as obstructing or regulating inter-State commerce. Such an occupation-tax proportioned to the business done, regardless of any distinction between business done wholly within the State and business done in part without the State, conforms to the rule

recognized by the Supreme Court of the United States, in attempting to mark out the boundaries of legitimate State taxation on the one side, and a regulation of inter-State commerce on the other.

"The tax in question is not invalid as a regulation of inter-State commerce, nor as a tax affecting government agencies or business."

The opinion further declares—

"The objection that the tax violates the law of uniformity, as prescribed by the constitution of the State, is not regarded as tenable, or as requiring further notice than a reference to previous decisions."

At page 7 of the Record is the finding of facts showing the character and extent of the Company's business, relied on as exempting it from State taxation.

Argument.

We may eliminate from the discussion so much of the Company's defense as is predicated on the allegation that the act in question is in conflict with the Constitution of the State, as the decision of it by the Supreme Court of the State cannot be reviewed here.

In reference to the act of Congress "to aid in the construction of telegraph lines;" it is only necessary to say that it contains no provision which is inconsistent with the power of State taxation.

It confers the right to construct lines over the public domain and along the military or post roads of the United States.

For this purpose it is authorized to use stone, lumber and other materials found on the public lands.

It is then provided that as to such companies, the messages sent by the government "shall have priority over all

other business, at such rates as the Postmaster General shall annually fix;" the government reserving the right to purchase the lines of all companies acting under the provisions of this act.

Before any company could exercise the powers and privileges thereby conferred, it is required that a written acceptance should be filed with the Postmaster General.

When this Company accepted the act it became entitled to all its privileges, and was bound by the obligations it imposed.

What are the obligations? First, the messages of the government were to have priority over all other business. Second, the rates of such messages were to be determined by the Postmaster General.

Neither of these at all relate to the subject of State taxation.

If the State had the right to impose the tax in question on a company that had not accepted the provisions of the act, it must necessarily possess the right to tax this Company.

If the government had exercised the reserved right to purchase this line of telegraph, a different question might arise.

It is true the government used this telegraph line for the transmission of its messages; but this did not constitute it such an agency as to protect it from State taxation.

As early as the case of *Osborne* vs. *Bank United States*, this question was disposed of.

9 Wheat., 816.

The Chief Justice, in delivering the opinion of the court, said:

"A private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner."

The same principle has been frequently announced by the court.

Thompson vs. *Union Pacific R. R.*, 9 Wall., 579;
Railroad vs. *Peneston*, 18 Wall., 5.

In the latter case it is said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the State, it is manifest the State governments would be paralyzed."

The question then remains, is the act under consideration void as being in conflict with the power vested in Congress to regulate commerce among the States?

While it is true that a State cannot regulate foreign commerce or commerce among the States, it may do many things which more or less affect it. It may tax a vessel used in commerce the same as any other property owned by its citizens. It may tax the stages used in the transportation of the mails. But this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use.

In the Passenger cases, 7 How., 480, the Chief Justice thus announces the limitation upon State power of taxation:

"The States are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying a tonnage duty. So far, their taxing power over commerce is restrained and no further. They retain all the rest, and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports, or a tonnage duty, for these alone are forbidden."

In *Railroad Company* vs. *Maryland*, Mr. Justice BRADLEY, referring to the difficulty which often presents itself in determining what amounts to a regulation of commerce, says:

"In view of the plenary powers which a State has always been conceded to have over its own territories, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It may incidentally affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers."

Again he says, in speaking of commerce carried on by land conveyances:

"This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one in that day imagined that the roads and bridges of the country were not entirely subject, both as to their construction, repair, and management, to State regulation and control. The power of the State to impose or authorize such tolls as it saw fit was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation. The

movement of persons and merchandise, *so long as it was free to one person as to another, to the citizens of other States as to the citizens of the State* in which it was performed, was not regarded as unconstitutionally restricted by tolls exacted on bridges or turnpikes, whether belonging to the State or private persons; and when, in process of time, canals were constructed, no amount of tolls which was exacted thereon, by the State or the company that owned them, *was ever regarded as an infringement of the Constitution.*" * *

"So, when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the State, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same."

21 Wall, 456.

We do not propose to enter at large on this much litigated and much adjudicated question; but shall confine ourselves to such decisions as most directly bear upon the case before us.

If the tax in this case had been a specific sum for carrying on the business of telegraphy, or on an assessment of the property of the company, or upon its gross receipts, no argument under the decisions, repeatedly made, could successfully assail its validity.

We then have a question touching the relation of the States to the general government involving the vital power of taxation, reduced to an inquiry into the mere phraseology of the act levying the tax.

What was the intent of the legislature in passing it?

This is answered by its own terms—

"There shall be *levied on*, and *collected from* every person,

firm, company or association of persons, pursuing any of the following named *occupations*, an annual tax on every such *occupation*."

Then follows the different occupations taxed, among which is the one in question.

"From every chartered telegraph company doing business within the State there shall be collected one cent for every full rate message, and one half that for every message less than a full rate message sent. This tax to be paid quarterly to the comptroller on the sworn statement of the manager of the company."

Is not this as it is declared to be a tax on the business or occupation of the company?

It is objected by the company that in as much some portion of its messages were sent beyond the limits of the State, the act is a regulation of inter-State commerce, and therefore invalid.

But this act does not purport to make any regulation or prescribe any rule in the conduct of this business.

Nor is it true that the tax on the Company, though it may effect the cost for transmitting the message, is therefore a regulation of commerce.

This effect may be equally produced whether the tax was in one form or another, and the argument, if sound, reaches necessarily to a denial of the right to tax in any mode whatever.

Let us admit that the tax is on the message and not on the company. Is the message to be regarded as *an article of commerce* passing through the State?

In *Nathan* vs. *Louisiana*, (8 How., 73,) "it is said that a bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mails."

In *Paul* vs. *Virginia*, (8 Wall., 168,) it was argued by Mr. Curtis that "the business of insurance is commerce. It is intercourse for the purpose of exchanging sums of money for promises of indemnity against loss. The contract of insurance is inseparable from commerce in modern times."

But the Court held—

"Issuing a policy of insurance is not a transaction of commerce. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale."

The right to tax this Company has been sustained by the Supreme Courts of Virginia and Ohio. The cases are reported in 26 Grat., 1, and 28 Ohio, 522. In the former case, the act imposed a license-tax; in the latter, the tax is levied on gross receipts.

In both cases, counsel who assailed the validity of the act as a regulation of commerce found it necessary to attempt a definition of the nature of a telegraphic message.

In the Virginia case, it is thus put:

"Waves of electricity are quite as fully subjects of exclusive dominion and property as any other external thing. The wire of a telegraph-line is nothing but a way, a means of passage, and the thing passing is not the less property because it is one of the imponderable elements."

In the Ohio case, the objection takes this form:

"The tax is an attempt to levy tribute for the privilege of stringing wires through the air for the passage of an insensible fluid, or rather for the passage of an idea."

Many messages sent by telegraph doubtless relate to commercial transactions, as an order to buy or an order to sell; but such an order itself is not an article of commerce, and is not property in the sense we are now considering it.

The tax in this case is not, however, laid on the message but on the Company for the number of messages sent by it. By the very terms of the act, the tax is payable *quarterly*, on the statement of the Company, so that it was collected long after they were sent. It is, in effect, a tax upon the Company's quarterly business.

In *Crandal* vs. *Nevada*, 6 Wall., a capitation tax was levied on stage companies for each passenger leaving the State by a stage coach. We then insisted that this was not a regulation of commerce, and it was so held by the court, though the act was declared to be invalid on other grounds.

At a subsequent term, we have the case of *Hinson* vs. *Lott*, reported in 8 Wall. There the act required that dealers in liquors should pay a tax of 50 cents upon each and every gallon sold.

The case showed that a portion of the liquors sought to be taxed were consigned to Hinson by a citizen of Ohio to be sold on his account. That another portion was purchased in the State of Louisiana, all of which he was offering for sale in the original packages in which they were imported.

The case of *Crandal* vs. *Nevada* was not overlooked. The syllabus thus states the decision:

"Although the *mode* of collecting the tax on the article made in the State was different from the mode of collecting the tax on the article brought from another State, yet the

amount paid was, in fact, the same on the same article in whatever State made.

"The act makes no discrimination. It is not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

In the same volume is *Woodruf* vs. *Parham*, where it is again said a tax on all sales ~~by a State~~, whether they be made by a citizen or a citizen of some other State, and whether the goods sold, are a produce of the State, enacting the law, or of some other State is valid.

Then we have *Osborne* vs. *Mobile*, in 16 Wall., where an express company, incorporated by Georgia, transacted business in Alabama. The tax was as follows: On every express company doing business beyond the limits of the State, $500; on every such company doing business within the limits of the State, $100; on every such company doing business within the limits of the city, $50.

This tax was held to be constitutional by the unanimous decision of the court.

If the tax had been confined to messages between points within the State, no argument could be made to invalidate ~~validate~~ the act.

This being so, the decisions above cited show that, as the tax makes no discrimination, the legality of the act cannot be assailed on the ground that a portion of the messages were sent through and beyond the limits of the State.

In the Freight Tax case, 15 Wall., where the statute was held invalid, the court considered the true test to be: "Where does the substantial burden of the tax rest?" On this inquiry, it is said: "*Very plainly it was not intended to be, nor is it, in fact, a tax upon the franchise, or upon the property, or upon the business of the company, measured by the number of tons of freight carried.*"

This conclusion is drawn from several provisions of the act. In reference to one of them, it is said: "No room is left for doubt. This provision demonstrates that the tax has no reference to the *business of the company*."

Again, "There is still another provision in the act which shows that the burden of the tax was *not intended* to be imposed upon the companies, neither upon their franchise, their property or their *business*."

After citing this provision, it is said:

"Evidently this contemplates a liability for the tax *beyond that of the Company required to pay it*. It authorizes the burden to be laid upon the freight carried *in exemption of the corporation owning the roadway*."

Again

"Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the *Company*, but upon the freight carried, and *because carried*, we proceed to inquire whether, so far as it affects *commodities transported through the State*, the act is a regulation of inter-State commerce."

As we understand this decision, it is rested upon the ground that the act was not intended to levy the tax on the Company, nor was this its effect, but, on the contrary, was intended to operate, and in effect did operate, directly on the freight carried, because it was carried, and so fell within the commercial clause of the Constitution.

Even as thus limited, two of the Justices dissented, holding that the tax was imposed upon the business of the Company; that the tonnage was only the mode of ascertaining the extent of the business; that no discrimination is made between freight carried wholly within the State and that carried through it sets this in a clear light and is conclusive on the subject.

This case is followed by that of the "State tax on gross receipts;" in which it was argued that there was "no dif-

ference in principle between a freight-tax regulated by reference to the articles transported and such a tax levied in the shape of a percentage of the money received for transportation."

Mr. Justice Strong, who delivered the opinion of the court in this as well as the preceding case, denied the proposition.

He says:

"No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce; yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons; and to the same extent we think, also, that such taxation may be laid upon a valuation, or, maybe, an excise, and that in exacting an excise-tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises, or upon the valuation of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted or to the extent of their exercise, or to the results of such exercise. *No mode of effecting this, and no form of expression which has not a meaning beyond this, can be regarded as violating the Constitution.*"

Then, after citing the provisions of the act, it is said:

"Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become the subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, a canal or steamboat, its tendency is to increase the cost of transportation still, it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid."

Again:

"The tax is not levied until the expiration of each half year, and until the money received for freights, and from other sources of income has actually come into the company's hands. Then it has lost its ~~destructive~~ distinctive character as freight by having become incorporated into the general mass of the company's property."

Three of the justices dissented, holding that this tax could not be distinguished from the one held to be unconstitutional in the Freight Tax case.

As heretofore said, we need not inquire how such State legislation would stand should Congress legislate on this subject and make telegraph lines part of the postal system, or declare them to be indispensable to trade and commerce between the States. It is sufficient for our purpose to say that Congress has not acted.

In *Cooley* vs. *Board of Warden*, the court, referring to the different regulations required by the different subjects upon which Congress may legislate under the commercial power, reaches this conclusion: That as some of the subjects are national in their nature or operation, admitting of one uniform plan or system, while others being local in their nature or operation can be best regulated by the State; the exclusiveness of the power in any case is to be determined more by the nature of the subject upon which it is to operate, than by the terms of the grant, which, though general, are not accompanied by any express prohibition to the exercise of the power.

The conflict of opinion upon this subject, which has heretofore existed among the members of the court, is now put at rest by the unanimous decision in *County of Mobile* vs. *Kimbal*, 102 U. S., in which, after citing this extract from

Cooley's case, the court say: "This may be considered as expressing the final judgment of the court."

There is nothing in the case of Pensacola Telegraph Co. (96 U. S., 1), in conflict with these views.

The question there presented is—whether the State had the right to confer a monopoly on one company,

The Court held that this action of the State was an attempt "to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction."

"It is unnecessary (say the Court) to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of 24 July, 1866, in effect amounts to a prohibition of all State monopolies in this particular."

On these considerations, it is submitted, the judgment must be affirmed.

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In Reply.

Regarding the case of *Osborn* vs. *Mobile*, referred to in the foregoing Brief as decisive of the controversy now before the court, we deem it proper to give a more detailed statement of the questions therein presented, the better to understand the scope of the judgment rendered.

The case was tried on an agreed statement of facts, set forth at page 3 of the Record, from which it appears that the Express Company was engaged in a business extending beyond the limits of the State in carrying merchandise of every kind, including articles of commerce, between different States, as well as goods and merchandise from foreign countries, and articles imported in their original packages.

That the company was at times employed by the officials of the United States in transporting the funds of the Government.

That the company (incorporated by the State of Georgia) was subject to and had paid on its property city and county taxes, and that it had also paid the tax levied by the United States.

The tax complained of as unconstitutional was levied by virtue of a city ordinance, which provided that—

"Every express company, or railroad company, who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of $500, if within the limits of the State $100, and if within the limits of the city $50."

Opposed to us in this case was Mr. Curtis, who not only filed a Brief, but also a stenographic Report of his argument.

From this it appears he maintained the act to be void, because of the nature of the business on which the tax was imposed.

"Commerce (he contended) was intercourse, and intercourse implies vehicles, instrumentalities and agencies.'

"A tax to do business, however styled, is a tax on the business, to be paid by and out of the business."

"It cannot be denied that a law requiring a person engaged in a particular business to take out a license, in order to confer on him the faculty or privilege of conducting that business, is a regulation of that business; and when this ordinance requires a person, in order to acquire the faculty or privilege of conducting this part of interstate commerce, to take out a license and pay for it, that is a regulation of commerce."

Once more:

"This is not a tax on property; it is a tax on a privilege or faculty or franchise to do a certain business."

We make this presentation of Judge Curtis's argument for the purpose of showing that it is the argument now relied on by the learned counsel, to wit: that the nature of the business in which the Telegraph Company is engaged exempts that business from taxation.

He cites the proposition of the Supreme Court of the State, "that the tax in question is an occupation tax; that is, a tax upon the occupation or business of the company."

His counter proposition is: "The business of the company is itself commerce."

"At the threshold of the argument the appellant insists that the business of a telegraph company is itself commerce, so that a tax upon that business is a tax on commerce, and upon inter-state commerce so far as the business of the company is inter-State."

In support of this proposition is a citation from the dissenting opinion on the State tax on gross receipts in which, it is said that "a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely or incidentally connected with commerce, the business of railroads and canals, namely, transportation of persons and property is itself commerce."

What is contended for (say counsel) is "that a tax on business, that is, a tax proportioned to the business done is peculiarly a tax on that from which the income from the business is derived, and cannot, in any guise, be levied on inter State business by a State."

It is thus shown that the contention in this case is the one presented in the case of *Osborn* vs. *Mobile*, in which the Chief Justice delivered the *unanimous opinion* of the court sustaining a license tax for the privilege of doing an express business, the company being engaged in inter-State commerce, notwithstanding the record showed that the company was taxed upon its property.

Of the judges who then constituted the court and concurred in the opinion but three remain, Mr. Justice MILLER, Mr. Justice FIELD, and Mr. Justice BRADLEY.

This case was decided at the same term in which the "freight tax" and the tax on "gross receipts" were disposed of. The point of decision in each is referred to, and the decision thus concludes:

"The license tax was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts within the State for such transportation beyond it. It was in reference to this feature of the

business that the tax was in part imposed; but it was no more a tax upon inter-State commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State."

On the 2d proposition of the plaintiff in error, "That the tax is not on the business of the company, but upon the messages themselves, which are a part of the intercourse of commerce," we refer to what is said in the foregoing brief.

In sustaining the tax in the case of "gross receipts," the Court said:

"The tax is not levied until the expiration of each half year, and until the money received for freights and other sources of income has actually come into the Company's hands. Then it has lost its distinctive character as freight by having become incorporated into the general mass of the Company's property."

This equally applies to the act now under consideration, the tax being levied on the quarterly receipts of the Company.

The learned counsel says that this "is a narrow and shadowy distinction compared with 'that broad and clear one,'" announced in his citation from the dissenting opinion, to wit: that "the business of said roads and canals, namely, the transportation of persons and property is itself commerce."

He asserts roundly that this distinction is adverse to the whole current of previous decisions as reviewed in the State "Freight Tax case," and suggests its reconsideration.

If we supposed that such a suggestion would be sustained by the court, we should make a similar suggestion in the "State Freight Tax case," being firmly of the opinion, announced by the dissenting Justices, SWAYNE and DAVIS, that the tax in that case "was imposed upon the *business*

of the Company, and that the tonnage was only the mode of ascertaining the extent of the business."

It is several times repeated in the brief of plaintiff in error that the State has imposed on this Company a double tax—first, on its lines and property assessed at their full value, and second, the tax in question. If this is at all material to the argument, we content ourselves by saying that this statement is in no wise sustained by the record.

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